

DECISION

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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-207710**DATE:** February 28, 1983**MATTER OF:** Overtime Compensation for Firefighters**DIGEST:**

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay.

This action is in response to a request from Mr. Gordon E. Grainger, President, Local 977, National Federation of Federal Employees, for a decision concerning the entitlement of firefighters at George Air Force Base, California, to additional premium pay when their overtime entitlement under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., is reduced due to court leave for jury duty during their regularly scheduled tour of duty. This matter has been presented under our procedures set forth at 4 C.F.R. Part 22 (1982) for decisions on appropriated fund expenditures which are of mutual concern to agencies and labor organizations. For the reasons set forth below, firefighters who are absent from work during their tour of duty while on court leave are entitled to receive the same amount of pay which they would otherwise receive for working their regularly scheduled 144-hour tour of duty in a biweekly work period.

The submission indicates that the firefighters at George Air Force Base are regularly scheduled to work a tour of duty of 144 hours in each bi-weekly work period and that they receive overtime

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compensation under the Fair Labor Standards Act for those hours in excess of 108 hours in their biweekly tour of duty. Local 977 further indicates that if a firefighter spends 8 hours performing jury duty (presumably during a regularly scheduled tour of duty) he would lose overtime compensation under the Fair Labor Standards Act for 8 hours for that biweekly work period since the 8 hours on court leave would reduce the hours on duty in the biweekly work period from 144 to 136 hours. They contend that since 36 hours (in excess of 108 hours per biweekly work period) are scheduled as part of the employee's 144-hour tour of duty, the overtime compensation for hours in excess of 108 hours should not be lost as a result of the performance of jury duty which reduces the total number of hours during which the firefighters are on duty in a biweekly work period.

They call our attention to title 5, United States Code, and remind us that for covered employees overtime entitlement must be considered under both the Fair Labor Standards Act and title 5, with the employee receiving the greater benefit. See paragraph 5 of Federal Personnel Manual Letter 551-5, January 15, 1975.

In a previous consideration of overtime entitlement of firefighters the Civil Service Commission (now Office of Personnel Management) advised us that, as a general practice, a Federal firefighter is scheduled for a tour of duty of 72 hours per week consisting of three 24-hour shifts. During each 24-hour shift the firefighter is normally in a work status for 8 hours and in a standby status, which includes a designated sleep period, for the remaining 16 hours. For this extended tour of duty, a firefighter receives, under title 5, United States Code, his basic rate of pay and premium pay on an annual basis for the standby duty, normally 25 percent of his basic rate of pay as authorized by 5 U.S.C. 5545(c)(1). See 55 Comp. Gen. 908 (1976). In the absence of information to the contrary we will assume that for each biweekly work period the firefighters at George Air Force Base work six 24-hour shifts. Furthermore, since the submission clearly indicates that the firefighters have not been authorized compensation for regularly scheduled

overtime under 5 U.S.C. 5542(a), we will assume that they receive annual premium pay under 5 U.S.C. 5545(c)(1) for regularly scheduled standby duty.

Subsection 6(c)(1)(A) of the Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, 88 Stat. 60, added subsection 7(k) to the Fair Labor Standards Act, 29 U.S.C. 207(k), extending compensation benefits to firefighters. Subsection 207(k) of title 29, United States Code, provides that in a work period of 28 consecutive days the employee is entitled to compensation at a rate not less than one and one-half times the regular rate for all hours his tour of duty exceeds the lesser of 216 hours or the average number of duty hours (as determined by the Secretary of Labor) for employees engaged in such activities in calendar year 1975. The 216-hour standard for overtime entitlement for a work period of 28 consecutive days is applicable to firefighters. See Federal Personnel Manual (FPM) Letter 551-16, January 15, 1980. For any work period between 7 and 28 days overtime compensation is paid on the basis of the same ratio of maximum non-overtime hours and days in the work period. See FPM Letter 551-16, supra. Thus, as stated in the submission firefighters are entitled to overtime compensation under the Fair Labor Standards Act for those duty hours in excess of 108 hours in a biweekly work period. Pursuant to its statutory authority at 29 U.S.C. 204(f) to administer the Fair Labor Standards Act with respect to most Federal employees, the Office of Personnel Management has issued instructions for applying the Fair Labor Standards Act to firefighters which appear in FPM Letter 551-5, January 15, 1975.

Only those hours that the employee is actually on duty during the tour of duty are included in hours worked under the Fair Labor Standards Act and paid time off is not included as hours worked. See paragraph C7, Attachment 2 to FPM Letter 551-5, January 15, 1975, and 5 C.F.R. 551.401(b)(1982). Thus, we have been asked whether the firefighters are to lose the compensation which they would otherwise receive for their regularly scheduled 144-hour tour of duty as a result of an absence on court leave which has reduced the amount of overtime compensation payable under the Fair Labor Standards Act.

The statutory authority for court leave, 5 U.S.C. 6322, provides in pertinent part that an employee " * * * is entitled to leave, without loss of, or reduction in, pay * * *" during a period of absence for service as a juror. A similar provision pertaining to Federal employees on military leave who are engaged in training in the Reserves and National Guard is set forth at 5 U.S.C. 6323.

In view of the Office of Personnel Management's authority to administer the Fair Labor Standards Act with respect to Federal employees, including firefighters, we requested their views on this matter. In its report of January 10, 1983, the Office has called to our attention the Civil Service Commission letter of September 7, 1976, to the Department of the Navy. That letter states the opinion that absences on court leave are not included as worktime under the Fair Labor Standards Act. Thus, the Commission held that an absence on court leave during a firefighter's regularly scheduled tour of duty would reduce his actual time on duty and therefore result in a reduction to his entitlement to overtime pay under the Fair Labor Standards Act. The Commission concluded that such a result was not in conflict with the court leave provision set forth at 5 U.S.C. 6322 since "hours of work" determinations are made separately under the appropriate provisions of the Fair Labor Standards Act and title 5, United States Code, and since a Federal employee must have legal entitlement to pay under the applicable law upon which the pay entitlement is based. In its report of January 10, 1983, the Office of Personnel Management has reaffirmed this view. Thus, that Office concludes that 5 U.S.C. 6322 provides authority to pay a Federal firefighter his full basic pay and title 5 premium pay for standby duty in a pay period during which he is excused for jury duty. However, it finds that 5 U.S.C. 6322 does not provide a legal basis for paying Fair Labor Standards Act overtime pay for periods of absence on jury duty when actual work is not performed.

We agree with the statement made by the Office of Personnel Management that the Fair Labor Standards Act

sets minimum standards to protect employees and we acknowledge that the Office is responsible for the implementation of the Fair Labor Standards Act for Federal employees. However, we are responsible for the interpretation of the provisions of title 5, United States Code. We cannot ignore the plain wording of 5 U.S.C. 6322. Under that provision an employee is entitled to leave for jury duty without reduction or loss of pay. A similar provision at 5 U.S.C. 6323 pertains to Federal employees on military leave, who are engaged in training in the Reserves and National Guard. The requirement in these provisions is that an employee shall receive the same compensation he otherwise would have received but for the fact that he was absent on military or court leave. 27 Comp. Gen. 353, 357 (1947). There is nothing in the language of 5 U.S.C. 6322 which restricts its application to compensation otherwise payable under title 5, United States Code, and we are not aware of anything in the legislative history of that provision which would compel such a restrictive view. Furthermore, that provision does not require that an employee meet the applicable statutory criteria for compensation during a period of court leave, but provides that the compensation of the employee shall not be diminished by such absence.

The firefighters at George Air Force Base are regularly scheduled to work a 144-hour tour of duty in each biweekly work period. Although the firefighters' entitlement to overtime compensation under the Fair Labor Standards Act is reduced for those biweekly work periods in which they are on court leave during their regularly scheduled tour of duty, the court leave provision, 5 U.S.C. 6322, provides authority to pay them the same pay as they otherwise would receive under the Fair Labor Standards Act. Accordingly, under the authority of 5 U.S.C. 6322 the firefighters are entitled to the same amount of pay which they would otherwise receive for their regularly scheduled tour of duty in a biweekly pay period notwithstanding periods of court leave.

Milton J. Fowler
for Comptroller General
of the United States